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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 353

IVAN MEVICA, PETITIONER

v.

P. A. ESPERDY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (R. 11–14) is reported at 317 F. 2d 220. The opinion of the district court (R. 6–8) is reported at 202 F. Supp. 214.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1963 (R. 14). The petition for a writ of certiorari was filed on August 8, 1963, and was granted on October 28, 1963 (R. 15). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the petitioner, a Yugoslav crewman, has maintained continuous residence in the United States since his entry so as to qualify for adjustment of status although, after his entry, he was ordered deported and effectuated his deportation by obtaining employment as a crewman on a Yugoslav merchant vessel and leaving with that vessel on a foreign voyage.

STATUTES INVOLVED

Section 101(a)(33) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1101(a)(33), provides:

> The term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent. Residence shall be considered continuous for the purposes of section 1482 and 1484 of this title where there is a continuity of stay but not necessarily an uninterrupted physical presence in a foreign state or states or outside the United States.

Section 249 of the Immigration and Nationality Act of 1952, as amended in 1958, 72 Stat. 546, 8 U.S.C. 1259, provides:

> A record of lawful admission for permanent residence may, in the discretion of the Attorney General and under such regulations as he may prescribe, be made in the case of any alien, as of the date of the approval of his application or, if entry occurred prior to July 1, 1924, as of the date of such entry, if no such record is otherwise available and such alien shall sat-

isfy the Attorney General that he is not inadmissible under section 212(a) insofar as it relates to criminals, procurers and other immoral persons, subversives, violators of the narcotic laws or smugglers of aliens, and he establishes that he—

(a) entered the United States prior to June 28, 1940;

(b) has had his residence in the United States continuously since such entry;

(c) is a person of good moral character; and

(d) is not ineligible to citizenship.

The "ninth proviso" to section 3 of the Act of February 5, 1917, 39 Stat. 874; 8 U.S.C. (1940 ed.) 136(q), provided:

> *Provided further,* That the Commissioner General of Immigration [1] with the approval of the Secretary of Labor shall issue rules and prescribe conditions, including exaction of such bonds as may be necessary, to control and regulate the admission of otherwise inadmissible aliens applying for temporary admission.

STATEMENT

Petitioner is a 58 year old native and citizen of Yugoslavia who first entered the United States at Baltimore, Maryland, on January 21, 1940, as a non-

[1] Under Reorganization Plan No. V, which became effective on June 14, 1940 (54 Stat. 230), the Immigration and Naturalization Service and its functions were transferred to the Department of Justice for administration under the direction and supervision of the Attorney General. 54 Stat. 1238.

immigrant crewman attached to a Yugoslav merchant vessel[1] (R. 3; G. Ex. 1, pp. 11, 15, 25, 31, 39, 60).[2] He was issued a temporary landing permit but remained in the United States longer than allowed (R. 3).[3] On September 4, 1942, he was ordered deported to Yugoslavia (R. 3; G. Ex. 1, p. 11). The warrant of deportation provided, in part (G. Ex. 1, p. 11):

> * * * If the alien returns to the United States from time to time and upon inspection is found to be a bona fide seaman and entitled to shore leave, except for prior deportation, admission under the 9th Proviso of Section 3 of the Act of February 5, 1917, in reference to this ground of inadmissibility is hereby authorized for such time as the alien may be admitted as a seaman.

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[1] Petitioner's vessel, at the time of his first entry, was the *S.S. Serafin Topić* (G. Ex. 1, pp. 11, 14a, 59a, 60). His former attorney stated before the Board of Immigration Appeals that petitioner arrived in the United States on board a "Yugoslav vessel" (G. Ex. 1, p. 39). *Lloyd's Register of Shipping 1939–1940*, entry number 33,448 of the section on "Steamers and Motorships of 300 Tons Gross and Over" and p. 182 of "Shipowners" section, shows that the *S.S. Serafin Topić* sailed under the Yugoslav flag, that its port of registry was Susak (a port in Northern Yugoslavia), and that its owner was "Slobodna Plovidba Topić," with addresses in Susak, Yugoslavia, and Trieste, Italy.

[2] "G. Ex. 1" refers to the administrative record of the case which was submitted to both courts below and has now been lodged with Clerk of this Court.

[3] Counsel's representation to the Board of Immigration Appeals that, after his initial entry in January, 1940, petitioner rebearded his ship and re-entered the country in 1941 (G. Ex. 1, p. 39), is apparently incorrect (see R. 5; G. Ex. 1, p. 59a, answer 14i). But, in any event, the only contention here (as below) is that petitioner's residence was interrupted by his departure in 1942, pursuant to an order of deportation.

Shortly thereafter, petitioner obtained employment as a crewman on the Yugoslav vessel *S.S. Dubravka*, which was docked in San Pedro, California (G. Ex. 1, pp. 1–3, 25, 31).[1] On September 28, 1942, an Immigration Inspector completed a Form 535, "Description of Person Deported", pertaining to the petitioner, with the notation "Has Jugo Slav passport #173/1942" (G. Ex. 1, p. 1). On October 6, 1942, the *S.S. Dubravka*, with petitioner on board, sailed from San Pedro on a foreign voyage. His departure was verified by an Immigrant Inspector who marked the warrant of deportation as executed and notified the New York District Director that the petitioner had left on the Yugoslavian vessel. (G. Ex. 1, pp. 1, 3, 11; see G. Ex. 1, p. 2).

The *S.S. Dubravka* proceeded to Talta, Chile, where the ship docked and took on a mineral cargo (G. Ex. 1, pp. 12, 25, 27). After Talta, the vessel, with petitioner still on board, stopped at Antofagasta, Chile, where the crew list was visaed (G. Ex. 1, pp. 12, 25). There is no indication whether petitioner disembarked at either of the Chilean ports. The ship then sailed to San Pedro, California, arriving on December 19, 1942 (G. Ex. 1, pp. 12, 31; see p. 24). An Immigration

[1] See *Lloyd's Register of Shipping 1941–1942*, section on "Steamers and Motorships of 300 Tons Gross or Over", entry number 22,681, and p. 51 of "Shipowners" section, which shows that the *S.S. Dubravka* sailed under the Yugoslav flag, that its port of registry was Dubrovnik (a port in southern Yugoslavia, and that its owner was "Dubrovnaka Plovidba", with an address in Dubrovnik, Yugoslavia, and one apparently in England. See also, *Lloyd's Register of Shipping 1942–1943*, entry number 72,636 and p. 52 of the respective sections.

officer boarded the vessel and ordered petitioner "detained on board at all U.S. ports & deport." (G. Ex. 1, pp. 12, 31). A few days later, the *S.S. Dubravka* proceeded to San Francisco, California, where petitioner was allowed to come ashore for medical treatment (G. Ex. 1, pp. 22, 24, 26, 27, 31; see pp. 12, 32).[a] Thereafter, petitioner apparently remained "unnoticed in this country for a period of more than seven consecutive years" (see G. Ex. 1, p. 31).[b]

In March 1952, new deportation proceedings were commenced against petitioner. After a hearing, petitioner was found deportable as an immigrant not in possession of a valid, unexpired immigrant visa, but was granted the privilege of voluntary departure (G. Ex. 1, pp. 30–31). The decision was affirmed by the Assistant Commissioner (G. Ex. 1, p. 34) and the Board of Immigration Appeals dismissed petitioner's appeal from that part of the order denying him suspension of deportation (G. Ex. 1, p. 40). Thereafter, petitioner was ordered deported to Yugoslavia, but that order was stayed administratively (see G. Ex. 1, 45, 49). In August 1956, the Board of Immigration Appeals withdrew the outstanding order and warrant of deportation and again granted petitioner the privi-

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[a] The government's brief in opposition (p. 3) erroneously states that petitioner was admitted as a seaman for shore leave pursuant to the waiver in the deportation order.

[b] The hearing examiner in the 1952 proceedings noted that petitioner had registered under the Selective Service Act of 1940 (G. Ex. 1, p. 32). His application for suspension of deportation filed in those proceedings indicated that he had registered under the Alien Registration Act (G. Ex. 1, p. 14). But the record does not show the dates of registry.

lege of voluntary departure (G. Ex. 1, pp. 55–56). After another administrative stay, an order was entered in October 1959, directing petitioner's deportation to Yugoslavia (G. Ex. 1, pp. 58, 59).

Petitioner thereafter applied for adjustment of status under Section 249 of the Immigration and Nationality Act (G. Ex. 1, p. 60). The application was denied by respondent on the ground that petitioner's deportation in 1942 constituted a break in his continuous residence in the United States after 1940 (R. 9; G. Ex. 1, p. 61). That decision was affirmed by the Regional Commissioner (R. 10; G. Ex. 1, p. 69).

The instant proceeding was commenced on June 21, 1960, when petitioner filed a complaint in the district court to review the administrative denial of Section 249 relief (R. 3–5). On February 21, 1962, summary judgment was entered for the respondent (R. 8; see R. 6–8). The court of appeals affirmed the decision on May 14, 1963 (R. 14; see R. 11–14).

ARGUMENT

INTRODUCTION AND SUMMARY

Section 249 of the Immigration and Nationality Act of 1952 permits the Attorney General to regularize the status of certain categories of aliens illegally in the country if specified conditions are satisfied. Among the prerequisites for obtaining permanent resident status—"registry" as it is commonly termed—are (1) entry prior to June 28, 1940, and (2) continuous residence in the United States thereafter. Having entered in January, 1940, petitioner meets the first condition. But he left the

country, under an order of deportation, in 1942, and remained absent, aboard a vessel of his own nation, for two and a half months. The only question here is whether that departure effected a break in his United States residence. If so, petitioner plainly does not qualify for relief under Section 249.

On the face of it, there would seem little room for argument. Petitioner was deported; he did not take an accidental or casual trip abroad. Though the means were of his own choosing, he left under compulsion of a final order of deportation. Nor did his "voluntary" departure defeat deportation. Petitioner himself concedes, as he must, that his leaving "executed the outstanding order of deportation." And, while the bar to his temporary re-entry as a seaman was lifted, his deportation finally closed the door to petitioner's resuming permanent residence here. These facts alone, it seems to us, establish a break in petitioner's residence in the United States. For expulsion is plainly inconsistent with continued residence. And that result, we think, does not depend on where the alien goes or how long he stays away. But, here, in any event, any possible doubt is resolved by the substantial absence involved and the fact that petitioner, on leaving the United States, resumed his former residence aboard a vessel under the jurisdiction of his own nation.

Petitioner's answer seems to be that his deportation was a mere "legal fiction," because, in light of the wartime conditions then prevailing, everyone knew that petitioner would shortly return; indeed, says he, "he was encouraged to ship with the under-

standing that [he] would be re-admitted upon return from [his] voyage." The rebuttal to this contention is twofold: (1) Insofar as it asserts petitioner's subjective desire to retain his American residence and return to it, the point is wholly irrelevant since the Immigration and Nationality Act expressly provides that residence shall be determinned "without regard to intent;" and (2) insofar as the claim is that the Immigration Service viewed his departure as temporary and legally insignificant, or misled petitioner into so viewing it, the allegation is wholly unfounded.

Because it seems the only relevant point in dispute, we address ourselves first (Point A) to the notion of an "understanding" through which petitioner might leave the country without consequence. We note that petitioner does not allege any particular agreement between himself and Immigration officials. To be sure, the original deportation order permitted petitioner, despite being a deportee, to enjoy temporary "shore leave" if he should return to one of our ports as "a bona fide seaman." But this was hardly an invitation to resume permanent residence in the United States as a shoreside worker. On the contrary, when he left, the Immigration Service noted his departure with a Yugoslav passport and marked their deportation warrant "executed." Nor is there merit in petitioner's contention that the Service must have viewed petitioner's departure as only temporary in light of the "practical impossibility" of deporting him during the war. The historical fact is that the Service (confirmed in its view a year later

by Congress) then followed the practice of deporting alien seamen whose homelands were occupied to the place where their government-in-exile was established, and that Great Britain, where the Yugoslav government was then located, welcomed such homeless seamen.

We turn next (Point B) to the proposition that the fact of deportation is inconsistent with the claim of continued residence in the United States, which is supported both by principle and precedent. And, finally (Point C), we show that, in the present circumstances, there was a clear break in the petitioner's United States residence, when he resumed his former residence aboard a Yugoslav vessel.

PETITIONER'S DEPORTATION FROM THE UNITED STATES AND SUBSEQUENT ABSENCE IN 1942 CONSTITUTED A BREAK IN THE CONTINUITY OF HIS RESIDENCE IN THE UNITED STATES FOR PURPOSES OF SECTION 249

A. PETITIONER WAS ACTUALLY DEPORTED WITH NO ENCOURAGEMENT TO RETURN TO THE UNITED STATES

We deal first with the suggestion that petitioner's departure in 1942 was somehow not a *bona fide* deportation.

1. As petitioner seems to concede (Pet. Br. 3, 9–10), his departure on a Yugoslav vessel in October 1942, after a final order of deportation had been entered against him, was, in law, a deportation. Indeed, the applicable statute (8 U.S.C. (1940 ed.) 180(b)),[9] ex-

[9] Section 1(b) of the Act of March 4, 1929, 45 Stat. 1551. That statute made it a felony for a deportee to re-enter or attempt to re-enter the United States and defined the term "deportation" for purposes of the Act. The provision was

plicitly provided that "any alien ordered deported (whether before or after March 4, 1929) who has left the United States shall be considered to have been deported in pursuance of law, irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he departed." See *Corsetti* v. *McGrath*, 112 F. 2d 719 (C.A. 9). The legislative history of this provision confirms the obvious: that Congress intended that an alien, like the petitioner, who voluntarily departed from the United States after entry of a final order of deportation, was to be considered deported. House Rep. 2418, 70th Cong., 2d Sess. at p. 6.'

As a matter of law, petitioner was deported. Moreover, his departure was so treated by the Service at the time. We have already noted that, a few days before his vessel sailed, an Immigration Inspector completed a personal description form for petitioner as a deportee, noting his impending departure as a seaman aboard the *S.S. Dubravka* and the fact that

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carried forward in Section 101(g) of the Immigration and Nationality Act of 1952, applicable to the Act as a whole.

' That report stated in part (*ibid.*):

"Owing to the inadequacy of the appropriations now made for enforcement of deportation provisions under existing law, the Department of Labor has, in many cases, after a warrant of deportation has been issued, refrained from executing the warrant and deporting the alien, at the expense of the appropriation, to the country to which he might be deported, upon the condition that the alien voluntarily, at his own expense, leave the United States. Some doubt exists whether an alien so departing has been 'deported.' Subsection (b) of section 3 of the bill therefore removes any possible doubt on this question by providing that in such cases the alien shall be considered to have been deported in pursuance of law."

he held a Yugoslav passport. And, on the day the ship left San Pedro, the deportation warrant was endorsed as executed.

2. Petitioner nevertheless asserts that, legal "fictions" aside, it was a "practical impossibility" to deport him and that the Service contemplated, indeed encouraged, his return. That claim, supported only by petitioner's self-serving affidavit filed in the district court (R. 5–6), is wholly unfounded.

The fact is that the government of the United States took all the steps it could to prevent the return of deserting seamen by deporting them, whenever possible, to the jurisdiction of the government of which they were nationals. The chief deportation problem of the Immigration and Naturalization Service during World War II was that of deserting alien crewmen. Section 20 of the Act of February 5, 1917, 39 Stat. 874, 890, 8 U.S.C. (1940 ed.) 196, which designated the countries to which aliens were to be deported, provided, in part:

> That the deportation of aliens provided for in this Act shall, at the option of the Secretary of Labor, be to the country whence they came or to the foreign port at which such aliens embarked for the United States; * * * or if such aliens are held by the country from which they entered the United States not to be subjects or citizens of such country, and such country refuses to permit their reentry, or imposes any condition upon permitting reentry, then to the country of which such aliens are subjects or citizens, or to the country in which they resided prior to entering the country from which they entered the United States.

It made no special provision for the deportation of aliens whose homeland had been overrun and occupied by the armed forces of another country.

Since it was a practical impossibility to deport deserting alien seamen to countries whose territory was occupied by enemy forces, the Immigration and Naturalization Service, during World War II, adopted the practice of deporting such seamen to the country in which their government-in-exile was located or to the foreign port from which they embarked for the United States. See H. Rep. 211, 78th Cong., 1st Sess., pp. 1–2; S. Rep. 156, 78th Cong., 1st Sess., pp. 1–2; 89 Cong. Rec. 2381, 2386. And since most of the overrun European countries, including Yugoslavia, had established a government-in-exile in England, each of which was recognized by the United States as the legal government of the particular country (89 Cong. Rec. 2381; *Documents on American Foreign Relations*, 1940–1941, Vol III, pp. 331–334),[8] most of the deportations in question were to England. 89 Cong. Rec. 2381, 3186. *Ibid.* This arrangement was satisfactory both to England and to the governments-in-exile since the services of the seamen-deserters were urgently needed. For the "first twelve months" of

[8] On April 17, 1941, after an eleven day onslaught by massed axis forces, Yugoslavia capitulated and King Peter fled the country. A Yugoslav Government-in-exile was first established in Cairo, Egypt, and, after the fall of Crete, moved to London in mid-June 1941. The Yugoslav cabinet was reorganized, and the new government was recognized by the Allied Powers as a member of the United Nations. See Miller, *War in Korea and History of World War II* (1955 ed.), pp. 272–279.

World War II—from about December 1941 to about December 1942—the Service deported most of the deserting seamen to the United Kingdom with the result that there were "practically no desertions from the ships because we were deporting them to the country where the government in exile was located." 89 Cong. Rec. 3186.

In 1943, Congress expressly ratified the wartime practice.* The occasion was a sharp increase in seaman desertions encouraged by a district court ruling, later reversed, holding that deportation must be to the territorial, not the political, jurisdiction of the alien's country. See *Delany* v. *Moraitis*, 46 F. Supp. 425 (D. Md.), reversed, 136 F. 2d 129 (C.A. 4). The legislative history of the measure clearly discloses Congress' concern that immunity from deportation would encourage desertions by alien seamen and impair the war effort of the allied powers. See H. Rep. 211, 78th Cong., 1st Sess., p. 2; S. Rep. 156, 78th Cong., 1st Sess., p. 2; 89 Cong. Rec. 2381, 2382, 3186–3187.

Plainly, the public policy of this government did not encourage petitioner to return to the United States

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*The Act of July 13, 1943, 57 Stat. 553, now Section 243 of the 1952 Act, 8 U.S.C. 1253(g), authorized the wartime deportation of aliens whose countries territorially were occupied by enemy forces to consenting countries where their recognized governments-in-exile were located; or, if the recognized governments had not established themselves in exile, then to countries which were "proximate" to the countries of which the aliens were citizens or subjects, or, with the consent of the countries of which the aliens are citizens or subjects, to any other countries.

when he left on a Yugoslav vessel, pursuant to an order of deportation, in 1942. The fact of the matter is that the Service was vigorously discouraging attempts by crewmen deserters to remain in the United States. They were returned to their homelands, or in the case of nationals of a government-in-exile, to the country where that government was located. But, so far as the United States was concerned, it was returning deserting seamen to the only "home country" they would have had if they had not deserted their ships. It was deporting them and thus unmistakably terminating whatever foothold they had tried to establish in this country.[10]

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[10] By the Act of August 8, 1958, 72 Stat. 546, Congress amended Section 249 of the 1952 Act in two particulars: First, the cut-off date by which entry into the United States had to be effected was advanced from July 1, 1924 (the date of the first permament quota statute) to June 28, 1940 (the date of the Alien Registration Act); second, the condition that the alien not be "subject to deportation," which had been a requirement since the first registry statute in 1929 (Act of March 2, 1929, 45 Stat. 1512), was dispensed with in favor of the less rigorous standard that he not be within those excludable classes of section 212(a) of the 1952 Act relating to criminals, narcotic violators, smugglers of aliens, subversives, procurers and other immoral persons. Compare 66 Stat. 219 with 72 Stat. 546. See Codifier's Note following Section 1259 of Title 8 U.S.C. The requirements of proving continuity of residence, good moral character, and eligibility for citizenship were left intact. Thus, the "elimination of the disqualification of deportables has made this procedure for adjustment of status available to many who previously were deportable as overstayed nonimmigrants or as illegal entrants." Gordon and Rosenfield, *Immigration Law and Procedure* (1962 ed.), § 7.6a, p. 736. See Auerbach, *Immigration Laws of the United States* (1955 ed.), p. 122. But,

Nor was petitioner's emigration to the United Kingdom, or to another land, made a "practical impossibility" because, as he asserts, he "had no travel documents which would have facilitated his landing in any other country" (Pet. Br. 4, 9). Form 535, "Description of Person Deported", which was completed eight days before petitioner departed on the *S.S. Dubravka*, clearly shows that petitioner "Ha[d] Jugo Slav passport # 173/1942" (G. Ex. 1, p. 1). And a passport, of course, is a "travel document." Sec. 101(a)(30) of the 1952 Act, 8 U.S.C. 1101(a)(30).

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while the approach was ameliorative and humanitarian, there is nothing in the legislative history of the 1958 amendment to suggest that Congress sought to relax the requirement of continuous residence. See S. Rep. 1905 and H. Rep. 1727, 85th Cong., 2nd Sess., pp. 1–2, respectively:

In 1962, the Senate approved but the House of Representatives rejected, a proposed amendment to Section 249 which would have advanced the required entry date to December 24, 1952. See S. Rep. 2276, 87th Cong., 2nd Sess., pp. 1–2; 108 Cong. Rec. 22,476 and 22,606. Congressman Walter, chairman of the House Judiciary Committee, stated that he was not in favor of advancing the required entry date of Section 249 (although he had previously introduced H.R. 11,911 which would have accomplished that result), since it would place a premium on the ability to hide. 108 Cong. Rec. 22,606, 22,607. The upshot of the disagreement was approval of a consolidation and streamlining of the suspension of deportation provisions under Section 244 of 1952 Act which, *inter alia*, denied suspension of deportation relief to alien crewmen. See the Act of October 24, 1962, 76 Stat. 1247. Senator Mansfield pointed out, during debate, that the amendment to Section 244 would grant "substantially the same relief" that would have been provided for in the earlier section 4 of the Senate Bill (*i.e.*, the proposed amendment to Section 249). 108 Cong. Rec. 23,448; see H. Rep. 2552, 87th Cong., 2nd Sess.; 108 Cong. Rec. 23,449.

3. There is, finally, no substance to the suggestion (Pet. Br. 20–21) that the provision of the deportation order granting petitioner advance permission to re-enter the United States temporarily as a seaman demonstrates that the Service expected and intended him to return to the United States to resume his residence. On its face, the waiver applied only to temporary entry "for such time as the alien may be admitted as a seaman," to "shore leave" accorded to a "bona fide seaman." The Ninth Proviso to Section 3 of the Immigration Act of 1917, 39 Stat. 874, 8 U.S.C. (1940 ed.) 136(q), to which the order referred, authorized the Service to promulgate rules and regulations "to control and regulate the admission of *otherwise inadmissible* aliens applying for *temporary admission.*" (Emphasis added.)[11] And the regulations in effect at the time simply provided that "the cases of all aliens of the excludable classes brought to seaports of the United States who apply for temporary admission * * * shall be submitted to the Department for special ruling." 8 C.F.R. 13.4 (1938 ed.). The advance "ruling" entered here was no more than it appears.

Then, as now, the law made prior arrest and deportation a basis for exclusion from the United States, and any entry or attempt to enter this country by such deported alien constituted a felony. 8 U.S.C.

[11] The provision now appears in a somewhat more restricted form in Section 212(d)(3) of the 1952 Act, 8 U.S.C. 1182(d)(3), which included that portion of Section 22 of the Internal Security Act of 1950, 64 Stat. 987, 1008–1009, relating to the Ninth Proviso.

(1940 ed.) 180(a)." And then, as now, it was also provided that an "alien subject to exclusion from admission to the United States * * * who is employed upon a vessel arriving in the United States shall not be entitled to any of the landing privileges allowed by law to seamen." 45 Stat. 1551, 8 U.S.C. (1940 ed.) 180(c)." Thus, the purpose of the waiver was simply to permit petitioner, if otherwise qualified, to enjoy shore leave like any other foreign seaman, despite his prior deportation, should his vessel bring him to our ports.

There is nothing here that "colors" petitioner's deportation, nor any invitation to return. It must be remembered that the waiver was part of the deportation warrant, issued a month before petitioner shipped on the *S.S. Dubravka* and while it was presumably contemplated that he would be conveyed to Great Britain. The stipulation merely recognized the life of the sea which would likely bring petitioner to our ports sooner or later, and, with due regard for the ground of his deportation—involving no finding of criminality or undesirability—lifted one bar to shore leave should the occasion arise. Similar Ninth Proviso relief was not unusual in deportation orders respecting seamen. See, *e.g.*, *Sit Jay Sing* v. *Nice*, 182 F. Supp. 292, 293, n. 4 (N.D. Cal.), affirmed, 287 F. 2d 561 (C.A. 9). In sum, the waiver carried with

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[11] Now contained in Sections 212(a)(17) and 276 of the 1952 Act, 8 U.S.C. 1182(a)(17) and 1326.

[12] See Section 252(a) of the 1952 Act, 8 U.S.C. 1282, for provisions which accomplish the same result.

it no special encouragement to petitioner to return at all, much less to establish a permanent residence here.

Nor can petitioner have been deceived by the narrow opening allowed. The language of the deportation order is plain enough that the only entry authorized was to a crewman on temporary shore leave. And that was not petitioner's status when he returned in late 1942. On December 19, 1942, he was ordered "detained on board at all U.S. ports" (G. Ex. 1, pp. 12, 31). On December 31, 1942, he was admitted into the United States for "medical treatment" (G. Ex. 1, pp. 24, 27, 31).[*] Moreover, petitioner testified at his 1952 hearing that when he entered the United States he intended to remain here and to reship on United States vessels. Thus, as the Special Inquiry Officer and the district court both found, petitioner's re-entry was not that of a *bona fide* seaman, *i.e.*, one who intended to re-ship in the same vessel that brought him to the port of arrival or another vessel within the temporary landing permit period (R. 8; G. Ex. 1, 31–33). In the circumstances, it ill behooves petitioner to tax the Immigration Service for treating him more generously than the law required.

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[*] The laws then in effect, as now, authorized a crewman's *temporary* admission for hospital or medical treatment. See Section 32 of the Act of February 5, 1917, 39 Stat. 874, 895, 8 U.S.C. (1940 ed.) 169, 170; Section 253 of the 1952 Act, 8 U.S.C. 1283. See H. Rep. 1365, 82nd Cong., 2d Sess., pp. 51–52, 66; S. Rep. 1515, 81st Cong., 2nd Sess., pp. 384–385.

B. DEPORTATION IS INCOMPATIBLE WITH CONTINUED RESIDENCE IN THE UNITED STATES

Deportation and continued residence in the United States are inherently incompatible. One whom Congress has found undesirable as a resident of the United States and who has actually been expelled from the United States cannot be allowed to claim residence in the United States. This Court, many years ago, in describing the essential character and effect of a deportation order, stated that deportation was not punishment for crime or banishment, but was simply "a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that *his continuing to reside here shall depend.*" (Emphasis added.) *Fong Yue Ting* v. *United States*, 149 U.S. 698, 730. An act which constitutes deportation must necessarily be an act which breaks continuous residence in the United States.

Congress had made it a felony for one to enter or attempt to enter within one year after deportation (unless a reapplication for admission had been consented to in advance.)[19] It would be inconceivable to hold that one could maintain a residence in the United States after deportation, but that any attempt to

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[19] Sections 212(a)(17) and 276 of the 1952 Act, 8 U.S.C. 1182(a)(17) and 1326. See Sec. 1(a)–(d) of the Act of March 4, 1929, 45 Stat. 1551, as amended by the Act of June 24, 1929, 46 Stat. 41, and the Act of May 25, 1932, 47 Stat. 165, 8 U.S.C. (1940 ed.) 180, 181.

come to that residence is a crime. This provision applied to petitioner for, as we have seen, the waiver of excludability under the 9th Proviso to Section 3 of the 1917 Immigration Act in petitioner's deportation order applied only to temporary admission as a crewman. Any entry by the petitioner other than as a crewman would have subjected him to criminal prosecution. His deportation thus necessarily constituted a break in his residence.

All the authorities are in agreement with the courts below that deportation operates as a severance of continuous residence for purposes of Section 249. *Sit Jay Sing* v. *Nice*, 182 F. Supp. 292, 295-296 (N.D. Cal.), affirmed, 287 F. 2d 561 (C.A. 9); *Lum Chong* v. *Esperdy*, 191 F. Supp. 935, 937 (S.D.N.Y.); *Boulamandis* v. *Brownell*, 247 F. 2d 83, 84 (C.A.D.C.); *Matter of P—*, 8 I & N Dec. 167, 169 (1958); *Matter of S—J—S—*, 8 I & N Dec. 463, 465 (1959). Gordon and Rosenfield, *Immigration Law and Procedure* (1962 ed.), § 7.6(b) 1962 Supp. p. 179. See also, *Matter of R—*, 8 I & N Dec. 598, 599 (1960).

Thus, in *Lum Chong* v. *Esperdy, supra*, the alien entered the United States in 1929; was ordered deported in January 1946; voluntarily departed from the United States as a crewman, signed up for a foreign voyage on board a vessel of United States registry, and, following a six week absence during which his ship docked at a foreign port (but the alien did not disembark on foreign soil), returned to the United States and was readmitted as a crewman for shore leave. The alien's departure was not verified by immi-

gration authorities, and the order of deportation was not marked as executed. The alien testified that, at the time he departed, he was unaware that a final deportation order had been entered against him. In upholding the denial of Section 249 relief, Judge Dimock stated, in part (*id.* at 937):

> To hold that an alien who had been excluded by law from this country still had here an actual dwelling place in fact while he was out of the country would be nothing but judicial revolt against the legislat[ure].

Similarly, in *Sit Jay Sing* v. *Nice*, *supra*, 182 F. Supp. 292, affirmed, 287 F. 2d 561 (C.A. 9), another Section 249 case, the alien entered the United States as a nonimmigrant crewman in 1939; overstayed his shore leave and was ordered deported in 1943; voluntarily departed from the United States as a crewman on board a vessel of United States registry; and returned to the United States seven weeks later. The deportation order was marked as executed when he departed in 1945. In holding that the provisions of Section 249 compelled rejection of the alien's contention that voluntary departure on board a vessel of United States registry did not interrupt his residence in the United States, Judge Youngdahl stated, in part (182 F. Supp. at 296):

> *If the plaintiff had been deported in 1945 at Government expense, he could not satisfy § 249. Simply because the Government permitted him to leave at his own expense does not mean a different result should obtain* * * * [T]he Government's consent to the method of depor-

tation does not lessen the force of the deportation; it does not make plaintiff's deportation something less than a Government-paid-for deportation. [Emphasis added.]

The Court of Appeals for the Ninth Circuit affirmed this decision *per curiam* "[f]or the reasons stated in the opinion of the district court." 287 F. 2d 561.

Boulamandis v. *Brownell*, 247 F. 2d 83 (C.A.D.C.), presented the question whether the voluntary departure in 1947, after entry of an order of deportation, of an alien who had maintained more than seven years continuous residence in the United States interrupted his residence in the United States for purposes of qualification for suspension of deportation under section 19(c)(2)(b) of the Immigration Act of 1917, as amended July 1, 1948, 62 Stat. 1206. In a *per curiam* decision, the court held that a break in residence had occurred since the appellant "had left the country * * * in the exercise of a privilege of voluntary departure after an earlier order of deportation." *Id.* at 84.

The administrative rulings, also, are consistent. While the Immigration and Naturalization Service recognizes that continuity of residence for purposes of Section 249 is not always synonymous with physical presence, and that temporary absences from the United States are permitted in determining eligibility under Section 249, it has consistently maintained that "departure from the United States as a result of exclusion or expulsion proceedings breaks the continuity of residence for the purpose of section 249." *Matter*

of P—, 8 I & N Dec. 167, 169 (1958); *Matter of S—J—S—*, 8 I & N Dec. 463, 465 (1959). In *Matter of R—*, 8 I & N Dec. 598, 599 (1960), the Assistant Commissioner, in upholding a grant of Section 249 relief by the district director, was careful to point out that the applicant's 1954 departure "was not the result of exclusion or expulsion proceedings and his absence was temporary." See, also, Gordon and Rosenfield, *Immigration Law and Procedure* (1962 ed.), § 7.6(b), p. 737, and 1962 Supp. p. 179.

In short, the crucial fact here is that petitioner was deported. That alone sufficiently distinguishes *Rosenberg* v. *Fleuti*, 374 U.S. 449. Decision there rested on the special history of a wholly distinct provision—and, unlike this case, involved a visit of a few hours to a neighboring country, not the applicant's. But, those differences to one side, the character of the "break" in residence is fundamentally dissimilar in the two situations. There, the traveller, with an established residence in this country, which he was free to retain indefinitely, left casually with the obvious intention of retaining his American abode and returning to it. Here, a seaman, illegally in the country and ordered expelled, departs under threat of compulsory deportation, with no hope of resuming his United States residence. Plainly, even if their absences were comparable and were to be judged under the same statute, the conclusion must be that Mrvica, unlike Fleuti, lost his American residence.

C. PETITIONER DID NOT HAVE AN ACTUAL DWELLING PLACE IN FACT WITHIN THE UNITED STATES WHILE HE WAS ON A YUGOSLAV SHIP

Petitioner places his principal reliance on the fact that residence is defined in Section 101(a)(33) of the 1952 Act as "the place of general abode," which in turn is defined as the "actual dwelling place in fact, without regard to intent". The argument is that the United States remained petitioner's "actual dwelling place in fact", despite his deportation, regardless of the intent of the United States to deport him and also without regard to petitioner's intent to return to the United States."

The definition cuts quite the other way. One cannot dwell "in fact" at a place from which one has been physically and lawfully excluded and to which one has absolutely no right to return. Deportation and continuous residence in the United States are mutually incompatible. Whether or not a deported alien takes up residence in another country, his compelled departure surely renders him a nonresident of the United States. If now, in peacetime, a Yugoslav national were deported to Yugoslavia and a week later he managed to slip into the United States, no one, we suppose, would argue that his deportation had not broken his continued residence in the United States. Yet, there was nothing in the wartime condi-

[10] Petitioner's intent to return to the United States after deportation is obviously of no significance under the statute. As noted above, return after deportation is a crime unless prior permission to apply is granted.

tions of 1942 that significantly altered that rule for petitioner's case: As we have shown, the United States intended and actually accomplished petitioner's deportation when petitioner, who had a Yugoslav passport, departed on a Yugoslav vessel under the jurisdiction of the Yugoslav government-in-exile.

If petitioner had a permanent residence after his deportation it was his home in Yugoslavia, where he had (and apparently still has) a wife and three children (G. Ex. 1, 19, 23, 60),[16a] the same permanent residence he had before his first desertion in 1940 and before his departure in 1942. His actual dwelling place in fact was his ship. Indeed, here, because the vessel he boarded flew the Yugoslav flag and was subject to the jurisdiction of that government (*Crapo* v. *Kelly*, 16 Wall. 610; *Wilson* v. *McNamee*, 102 U.S. 572, 574; *United States* v. *Rodgers*, 150 U.S. 249, 264–265; see *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 600–602), it may be said that petitioner at once resumed his former Yugoslav residence.[17] *Delany* v. *Moraitis*, 136 F. 2d 129 (C.A. 4).

There is no novelty in the suggestion that a seaman can have his residence aboard a ship, and that the flag of the vessel may be significant for purposes of residence. Congress gave recognition to this principle many years ago when it enacted legislation permitting the naturalization of seamen who served on certain American vessels without regard to the general resi-

[16a] At his 1952 deportation hearing, petitioner testified that, during his stay in the United States, he sent the equivalent of $200 per month to his family in Yugoslavia (G. Ex. 1, p. 19).

[17] Though the fact is fortuitous, it is worth noting that prior to his initial entry into the United States, petitioner's actual dwelling place was another Yugoslav vessel.

dence requirements. The Act of May 9, 1918, 40 Stat. 542, amended the Naturalization Act of 1906, 34 Stat. 596, by making eligible for naturalization "without proof of the required five years' residence" aliens who had served for three years on board any vessel of the United States Government or "for three years on board of merchant or fishing vessels of the United States of more than twenty tons burden."[18] But, at the same time, the Act made clear that "service by aliens upon vessels other than of American registry, whether continuous or broken, shall not be considered as residence for naturalization purposes within the jurisdiction of the United States, and such aliens cannot secure residence for naturalization purposes during service upon vessels of foreign registry."[19] In *McDonald* v. *United States*, 279 U.S. 12, 22–23, this Court rejected a claim of continuous residence during a period of service as a master of an American-owned but foreign-registered vessel, notwithstanding the

[18] See the Act of June 7, 1872, 17 Stat. 262, 268, R.S. 2174, which allowed admission to citizenship of alien seamen who had "served three years on board of a merchant vessel of the United States subsequent to the date of [his] declaration [of intention to become a United States citizen]."

[19] This provision was "in reality simply declaratory of the law as it existed before the time of the passage of the amendment." *United States* v. *Habbick*, 287 Fed. 593, 595 (E.D.N.Y.). See *Petition of MacKinnon*, 183 N.Y.S. 108 (App. Div., 2d Dept.); *In re Willis*, 169 N.Y.S. 261, 262 (Sup. Ct. N.Y. County). In the *Willis* case, the naturalization court, in rejecting the applicant's claim of continuous residence for naturalization purposes where he had been employed as a crewman on a ship of foreign registry during the critical period, declared that "residence aboard a foreign vessel cannot be construed as a residence in the United States. It can only be considered as being upon foreign territory." *Ibid.*

fact that the alien had a wife and family residing in the United States at the time.

Later, Congress specifically provided that service aboard certain American vessels should be deemed "residence" for purposes of the naturalization provisions. Section 307(d) of the Nationality Act of 1940, 54 Stat. 1137, 1143, so characterized "[c]ontinuous service by a seaman on a vessel or vessels whose home port is in the United States and which are of American registry or American owned, if rendered subsequent to the applicant's lawful entry into the United States for permanent residence and immediately preceding the date of naturalization." And Section 325 (a) of the same Act, 54 Stat. 1150, made it possible for certain seamen who served honorably for five years on board vessels belonging to the United States Government or certain vessels "which [were] not foreign vessels, and whose home port [was] in the United States" to be naturalized "without having resided continuously * * * in the United States for * * * five years," the rationale being that such ships were "regarded as United States soil." 86 Cong. Rec. 11,964; S. Rep. 2150, 76th Cong., 3rd Sess., p. 3. Finally, Section 330 of the 1952 Act, 8 U.S.C. 1441, which is a substantial re-enactment of Section 26 of the Internal Security Act of 1950, 64 Stat. 987, 1015,* provides, in part:

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* The purpose of this provision was to "limit" the application of Section 325 to those aliens admitted for permanent residence and to require that the service be on vessels "fully owned" by the United States or an American citizen or corporation. H. Rep. 3112, 81st Cong., 2nd Sess. p. 61.

> Any periods of time during all of which a person who was previously lawfully admitted for permanent residence has served honorably or with good conduct, in any capacity other than as a member of the Armed Forces of the United States, (A) on board a vessel operated by the United States, or an agency thereof, the full legal and equitable title to which is in the United States; or (B) on board a vessel whose home port is in the United States, and (i) which is registered under the laws of the United States, or (ii) the full legal and equitable title to which is in a citizen of the United States, or a corporation organized under the laws of any of the several States of the United States, shall be deemed residence and physical presence within the United States within the meaning of section 1427(a) of this title, if such service occurred within five years immediately preceding the date such person shall file a petition for naturalization.

In light of these provisions it seems plain petitioner's residence aboard the Yugoslav ship broke the continuity of his residence in the United States. Indeed, it would be most incongruous to attribute to Congress, which has distinguished between service by a crewman on an American vessel and service on a foreign vessel in crediting residence for purposes of naturalization (Section 330 of the 1952 Act and its statutory antecedents),[11] a purpose to blur the distinction, or to ignore ship service altogether, when it

[11] See *McDonald* v. *United States*, *supra*; *Duron* v. *United States*, 246 F. 2d 400, 402 (C.A. 2); *United States* v. *Camean*, 174 F. 2d 151, 153 (C.A. 2); *Petition of Witt*, 118 F. Supp. 855, 856-857 (E.D. N.Y.); *Petition of Napalon*, 145 F. Supp.

comes to residence for purposes of registry under Section 249. Registry, after all, is often a first step toward naturalization: it legalizes the alien's status to that of one lawfully admitted for permanent residence [22]—the basic condition precedent to naturalization. Sections 316 and 318 of the 1952 Act, 8 U.S.C. 1427 and 1429.

CONCLUSION

For the reasons set forth, we respectfully submit that the judgment below should be affirmed.

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295, 298 (S.D. N.Y.); *In re Van Der Schuur*, 20 F. Supp. 42, 43 (N.D. Cal.); *Petition of Bone*, 19 F. Supp. 219, 222 (E.D. Mich.); *Application of Aguirre*, 90 F. Supp. 668, 670 (S.D. N.Y.); see also, *Kwong Hai Chew* v. *Colding*, *supra*; *Petition of Karadzas*, 124 F. Supp. 25, 26 (S.D. N.Y.).

[22] See, S. Rep. 1504, 70th Cong., 2nd Sess., p. 4; H. Rep. 2763, 70th Cong., 2nd Sess., pp. 2-3; H. Rep. 318, 76th Cong., 1st Sess., p. 2; S. Rep. 916, 76th Cong., 1st Sess., pp. 1-2; 70 Cong. Rec. 2289, 2980, 4696, 4779, 4947, 5172. See *Sit Jay Sing* v. *Nice*, 182 F. Supp. 292, 296 (N.D. Cal.), affirmed, 287 F. 2d 561 (C.A. 9); *Linklater* v. *Perkins*, 74 F. 2d 473, 476 (C.A. D.C.); *United States* v. *Goldstein*, 30 F. Supp. 771, 773 (E.D. N.Y.); Gordon and Rosenfield, *supra;* Auerbach, *Immigration Laws of the United States* (1955 ed.), p. 9; Kansas, *United States Immigration, Deportation and Citizenship* (3rd ed., 1948), p. 312.

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